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No. _____

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IN THE

Supreme Court of the United States

October Term, 1984

CORNELIUS C. SCOTT, III,

Petitioner,

v.

ADELINE CLAUDIA SCOTT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL FOURTH APPELLATE DISTRICT STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Can a state, in a dissolution of marriage context, divide the military retired pay of an active duty service member in spite of the limitations of the Federal Uniformed Services Former Spouses' Protection Act, 10 U.S.C. Section 1408?

2. A state, under the Federal Uniformed Services Former Spouses' Protection Act, can only divide the disposable, and not the gross, military retired pay.

3. Are the limitations of the Federal Uniformed Services Former Spouses' Protection Act as to division of active duty pay substantive or procedural?

INDEX

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF FACTS	2
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	7

TABLE OF AUTHORITIES

Page

CASES

In Re Marriage of Costo,
3 Civ. 22926, decided May 31, 1984 6

In Re Marriage of Gilmore
(1980) 29 Cal.3d 418 4,5

McCarty v. McCarty
(1981) 435 U.S. 210 4

STATUTES

California Rules of Court 28 4

Federal Uniformed Services Former Spouses' Protection Act
10 U.S.C. Section 1408 ..... i,3
10 U.S.C. Section 1408(c)(1) 4
10 U.S.C. Section 1408(c)(3) 5

28 U.S.C. Section 1257(3) 2

Report No. 97-502, July 22, 1982; 3 U.S. Code
Congressional and Administrative News, 97
Congress - 2nd Session, 1982, pp. 16, 38-39 5

CONSTITUTION

United States Constitution,
Article I, Clauses 13 and 14 2
Article III, Section 2 2
Article IV, Clause 2 2

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL FOURTH APPELLATE DISTRICT STATE OF CALIFORNIA

Petitioner, CORNELIUS C. SCOTT, III, prays that a writ of certiorari issue to review the judgment of the Court of Appeal, Fourth Appellate District, State of California rendered in these proceedings on May 23, 1984.

OPINIONS BELOW

The opinion of the Court of Appeal, Fourth Appellate District, Division One, State of California, appears at Appendix A. The judgment of the California Supreme Court appears at Appendix B.

JURISDICTION

The order or judgment of the California Court of Appeal was entered on May 23, 1984. See Appendix A. This Petition for Certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article I, Clauses 13 and 14:

> (13) NAVY. To provide and maintain a Navy.
>
> (14) GOVERNMENT AND REGULATION OF LAND AND NAVAL FORCES. To make Rules for the Government and Regulation of the land and Naval Forces.

Constitution of the United States, Article III, Section 2:

> "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."

Constitution of the United States, Article VI, Clause 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . ."

STATEMENT OF FACTS

Petitioner, CORNELIUS C. SCOTT, III, is on active duty in the United States Navy. He and his former spouse, ADELINE C. SCOTT, had dissolved their marriage in the San Diego County Superior Court in 1977, and the relevant judgment determined that ADELINE had a 35%

interest in the Armed Forces Retirement of Petitioner. ADELINE was also awarded spousal support which award is ongoing.

On August 12, 1982, ADELINE sought in the California Courts a "division" of the military retired pay of Petitioner even though he had not yet retired from active duty. Alternatively, she sought an increase in spousal support equal to her 35% interest in the retired pay.

The Petitioner objected that he was still on active duty and, that, therefore, under the limitations of the Federal Uniformed Services Former Spouses' Protection Act, 10 U.S.C. Section 1408 (hereinafter "FUSFSPA"), his military retired pay could not be divided. He asked that the trial court defer decision on the military retired pay issue and deal solely with the spousal support issue.

The trial court, however, found that Petitioner was eligible to retire as of July 1, 1982, having served twenty years in the Armed Forces on that date, and that his 35% interest in his military retired pay was $645.91 at the present time. The Court ordered that amount paid monthly as of August 1, 1982. The Court did not reduce the previously ordered spousal support dollar-for-dollar to match the cash flow from the division of military retired pay, but rather reduced it from $750.00 to $355.00 monthly effective August 1, 1982.

The Petitioner appealed the subject order, but on May 23, 1984, the Court of Appeal, Fourth Appellate District, Division One, of the State of California, affirmed the trial court order with but a minor modification. The Court of Appeal held that FUSFSPA does not preclude California from distributing a military retired pay interest even though the service member is on active duty. The Court said that FUSFSPA expresses only a general Congressional intent that military pensions be treated similarly to other pensions under applicable State community property law. The Court rejected the arguments of Petitioner that even if his military retired pay could now be divided, FUSFSPA limited the division to the "disposable" and not the "gross" retired pay. Finally, the Court of Appeal rejected the argument of Petitioner that the trial court should have dealt with the problem of cash flow between the parties through the available remedy of spousal support and not division of military retired pay.

The Petitioner asked for leave of the Supreme Court of California to file a Petition for Hearing therein, and it was denied on July 25, 1984.

See Exhibit B. The California Supreme Court has also failed on its own motion to grant a hearing on the matter pursuant to California Rule of Court 28. The Order of the California Supreme Court is now final because of its action of July 25, 1984.

REASONS FOR GRANTING THE WRIT

This case raises as a matter of first impression in this Court the crucial question of whether or not a State can "divide" the military retired pay of an active duty service member. To be clear, we should state that the action in this case "divides" military retired pay a service member does not even receive. The action of California is predicated upon its Supreme Court decision in *In Re Marriage of Gilmore* (1980) 29 Cal.3d 418, which held that a nonemployee's former spouse may elect to receive a share, as community property, of retirement benefits which the other spouse is presently eligible to receive but does not in fact receive. The *Gilmore* case did not involve a military pension and the Court of Appeal decision in this case is the first published California decision which holds that FUSFSPA does not preclude the division of the prospective retired pay of an active duty service member. The opinion of the Fourth Appellate District, Appendix A, is in error in several regards.

First, we must recite that *McCarty v. McCarty* (1981) 435 U.S. 210, completely blocked the power of the States to divide military retired pay as community property. That power was returned to the States through the passage of FUSFSPA, but only subject to the limitations that Act contains. Congress did not intend to totally overrule the *McCarty* decision, but rather lifted the bars of federal preemption only upon certain conditions. In this respect, it is important to note that the key section of FUSFSPA begins with the language, "Subject to the limitations of this section . . ." 10 U.S.C. Section 1408(c)(1).

The limitations then set out in the Act did not exist prior to the enactment of FUSFSPA: In this respect, the consent of Congress that we may divide military retired pay as community property is *conditional*, and the Doctrine of Federal Preemption prevents us from doing other than what is allowed by FUSFSPA.

The decision of the Court of Appeal contravenes the terms of FUSFSPA in two important ways:

First, FUSFSPA did not consent to the "division" of active duty pay. This conclusion follows inescapably from several lines of analysis.

The Act, in its every description of what States do, refers to "retired" or "retainer" pay; these references are myriad, and *never* is there reference to active duty pay.

It is one thing to consent that retired personnel pay over a portion of their retired or retainer pay to a former spouse, but another to say that an active military duty person must make such a payment. The latter order affects national defense directly in a way not condoned by Congress. To allow such a "division," is to invite a case where an active duty service member pays over 50% of retired pay he does not in fact receive while he or she remains on active duty. Since active duty personnel are often unable to supplement their military pay, the practical effect of such a division is to compel retirement. Such an outcome is prevented by the language of Section 1408(c)(3) of FUSFSPA:

> "This section does not authorize any Court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section."

The subsection quoted above was used by Congress after testimony before the Committee on Armed Services that specifically discussed the *Gilmore* case and how Congress could *prevent* such a result in the case of an active duty service member. Report No. 97-502, July 22, 1982; 3 U.S. Code Congressional and Administrative News, 97 Congress - 2nd Session, 1982, pages 16, 38-39.

In other words, Congress had presented to it the exact *Gilmore* decision and citation and *still* put in the limitation of Section 1408(c)(3).

The second limitation contained in FUSFSPA that is contravened by the Court of Appeal decision is that the Act limits retired pay division to *disposable* retired or retainer pay. The Court of Appeal did not change the Order of the trial court, which based the division upon the *gross* amount that petitioner would receive where he to retire. The Act in its grant of substantive power to the States used the following language:

> "Subject to the limitations of this section, a Court may treat disposable retired or retainer pay payable to a

> member for pay periods beginning after June 25, 1981, either as property solely of a member or as property of the member and his spouse in accordance with the law of the jurisdiction of such a Court."

At no place in FUSFSPA does there appear a grant of power to the States to divide the gross military retired pay; at all times, whether the Act talks of a substantive grant of power where a limitation on enforcement, the word "disposable" retired or retainer pay is used.

The Court of Appeal allowed no credit to petitioner for deductions allowed him by the Act before his disposable retired pay is divided. Indeed, one conundrum presented by this case is that we cannot know what is the disposable retired pay of petitioner until he actually retires, and this fact indicates error in the Court of Appeal's decision to divide active duty pay.

The decision of the Court of Appeal did not treat the limitations of FUSFSPA as substantive. In fact, in a rather cavalier analysis, the Court said that ". . . FUSFSPA expresses only a general congressional intent that military pensions be treated similarly to other pensions under applicable state community property law." That analysis is astonishing in light of the express limitations contained in FUSFSPA: Congress did *not* give carte blanche to the States to treat military pensions "similarly to other pensions." To so hold would be to gut FUSFSPA and say its language is merely precatory.

Contrast the holding in this case with that of the Third Appellate District in *In Re Marriage of Costo*, 3 Civ. 22926, decided May 31, 1984. In that case, a trial court divided the disability income of a retired service member, and the Court of Appeal held that that decision was in contravention of the terms of FUSFSPA. The Court of Appeal said as follows:

> "It is clear that Congress granted to the States the limited right to divide 'disposable retired pay.' Section (a)(4) of the Act removes any ambiguity as to the meaning 'disposable' by expressly defining what the State Courts may divide. That section provides: 'Disposable retired or retainer pay means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under Chapter 61

> of this title) less amounts which -- (A) Are owed by that member to the United States; (B) Are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts -- marshals, Federal employment taxes, and amounts waived in order to receive compensation under Title 5 or Title 38.'"

The Court of Appeal went on to say:

> "There is no ambiguity in the statute. Congress clearly intended to and did exclude from division by the State Courts that 'amounts waived in order to receive compensation under . . . Title 38.'"

Thus, California authority is split within itself; one of its Courts says that FUSFSPA expresses a "general Congressional intent," and another says FUSFSPA contains substantive limitations.

CONCLUSION

There is no question more federal in nature than the well-being of our Armed Forces. The Constitution makes it clear they are a federal domain. Congress, through FUSFSPA, has built in certain limitations that apply to the division of military retired pay as community property. California in this case does not accede to two of those limitations and has ordered that an active duty service member divide retired pay he does not actually receive with his former spouse. The Order may compel his retirement and lose to the Armed Services a capable service member. This is not the result Congress contemplated when it passed FUSFSPA. Nor did Congress consent that gross retired pay be divided. A state, under FUSFSPA, can only divide the disposable, and not the gross,

military retired pay. For these reasons a writ of certiorari should issue to review the decision of the Court of Appeal.

DATED: August 17, 1984.

Respectfully submitted,

KNOLL, CORR & PFEIFER

By: JOHN KNOLL

Attorneys for Petitioner

APPENDICES

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

In re the Marriage of ADELINE CLAUDIA and CORNELIUS CHAPMAN SCOTT III	Keenan G. Casady, Clerk MAY 23 1984 COURT OF APPEAL FOURTH DISTRICT
ADELINE CLAUDIA SCOTT, Petitioner and Respondent, v. CORNELIUS CHAPMAN SCOTT, III, Respondent and Appellant.	D000710 4 Civ. No. 28613 (Super. Ct. No. DN 14125)

APPEAL from an order of the Superior Court of San Diego County, Gilbert Nares, Judge. Affirmed.

Daubney and Banche and William Henry Daubney for Petitioner and Respondent.

Knoll, Corr & Pfeifer and John Knoll for Respondent and Appellant.

Cornelius Chapman Scott III appeals a post-judgment order that he make monthly payments to his ex-wife equal to her present community interest in his vested and matured military pension even though he chooses to remain on active duty. In addition, the trial court modified and retained jurisdiction over spousal support and ordered Cornelius to advise it of any changes in his retirement entitlement to allow for future adjustments in his ex-wife's entitlement. We hold an ex-spouse having a community interest in a matured military retirement may not be deprived of present use of that property because the serviceperson finds it in his or her interest to remain on active duty. We affirm.

BACKGROUND

Cornelius has a vested, mature interest in a military pension. Although presently eligible to receive pension benefits should he retire, he voluntarily remains in active service. At the time the marriage was legally dissolved, Cornelius' retirement rights had matured and Adeline's community property interest in the pension was established as 35 percent of the pension's worth, computed on 20 years service. After the retirement rights matured, Adeline exercised her option and elected to receive her community share of the pension before Cornelius retires. The trial court calculated the dollar value of Adeline's community share were Cornelius to retire the date of its order and ordered monthly payments to her.[1] Cornelius claims federal law prohibits division of his military retirement pay while he remains on active duty, but if division is permitted, it should be calculated on the "net" retirement pay he would receive, not the "gross."

DISCUSSION

We find this case controlled by the rule stated in *In re Marriage of Gillmore*, 29 Cal.3d 418, 428. There, the Supreme Court held a nonemployee former spouse may irrevocably elect to receive the present value of a community share in a vested, mature interest in a pension, or to delay payment until payments are made to the spouse under the pension plan.

Cornelius distinguishes *Gillmore* as not involving a military pension, contending the Federal Uniformed Services Former Spouses Protection Act (FUSFSPA), 10 United States Code section 1408, precludes distributing any interest in military pension benefits until he actually retires. However, FUSFSPA expresses only a general congressional intent that military pensions be treated similarly to other pension under applicable state community property law.

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[1]Cornelius suggests there is a mathematical error to his detriment of approximately $35 per month. Adeline does not respond to this contention and the record does not show the income factors used in the trial court's computations. We assume any mathematical inaccuracy is clerical and may be corrected by the trial court if brought to its attention.

Even if a present division is permitted, Cornelius contends FUSFSPA allows distribution of a community interest only in "disposable retired or retainer pay," which it defines as the net he would receive after certain specified deductions.[2] Because a trial court cannot know the actual deductions, or their dollar amounts, on future retirement pay, Cornelius claims any pre-retirement division is factually impossible. He identifies only his state and federal income tax withholding as properly excluded from his "disposable pay" but suggests there may be other proper deductions. However, the payments to Adeline must be included in her gross income subjecting them to income tax liability, and freeing Cornelius of any tax liability on the share of benefits remitted to her. (See Tax Aspects of Marital Dissolutions: A Basic Guide for General Practioners [*sic*] (Cont.Ed.Bar 1979) § 4.12, p. 87.) Thus, these raise no legal or equitable barrier to applying *Gillmore's* rationale to Cornelius' matured military retirement benefits.

Cornelius expresses concern the portion of the order retaining jurisdiction and requiring him to inform the trial court of changes in his pension rights reflects its intent to award Adeline an interest in that portion of any value increase in his pension rights attributable to his continued service. However, the order only expresses the trial court's retained discretion to adjust continuing spousal support to reflect changed circumstances. (*In re Marriage of Gillmore, supra*, 29 Cal.3d 418, 427.) In any event, we stress Adeline has irrevocably elected to take her share of the pension now, and must forego any appreciation in the pension's value resulting from Cornelius' continued service. (*Id.*, at p. 428, fn. 9.) She is, however, entitled to share in any increase in benefits which would have been received had Cornelius actually retired on the date she elected to receive her interest, such as automatic cost-of-living adjustments. Likewise, the value of her interest will decrease proportionally in the unlikely event congress adjusts its benefits downward. Where periodic increases in retirement benefits are based on both types of factors, simple arithmetical procedures will determine how they are to be divided.

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[2]These deductions are listed in 10 United States Code section 1408(a)(4)(A-F). None, except income tax withholding appear relevant were Cornelius to retire now. He cites withholdings for an annuity under a survivor benefit plan, ignoring the statutory language limiting this deduction to annuities in favor of the ex-spouse to whom community proceeds are being paid. He does not claim to be contributing to an annuity for Adeline, nor does he express any desire to do so in the future.

Lastly, we reject Cornelius' argument that it was an abuse of discretion for the trial court not to have deferred division of the community interest until he retired and exercised its option to adjust spousal support to "accomplish a fair result." The plain fact is, the trial court does not have that option, the choice is with the nonemployee former spouse who owns the property. The trial court is limited to determining the most equitable method of present division; neither it nor the employed spouse may defeat Adeline's property rights.

Order affirmed.

CERTIFIED FOR PUBLICATION.

WORK, J.

WE CONCUR:

STANIFORTH, Acting P.J.

WIENER, J.

B-1

OFFICE OF THE CLERK

Supreme Court of California

SAN FRANCISCO, CALIFORNIA

LAURENCE P. GILL, CLERK

July 25, 1984

John Knoll, Esq.
Knoll, Corr & Pfeifer
2366 Front Street
San Diego, CA 92101-1484

Re: 4 Civil 28613 - Scott v. Scott

Dear Mr. Knoll:

The application for relief from default and petition for hearing were presented to the court for its consideration.

The court directed that the petition for hearing be returned for the reason that it would not grant the permission necessary to allow the untimely filing.

Enclosed find a copy of the court's policy statement in this regard. Also enclosed is your check for $200.00.

Very truly yours,

LAURENCE P. GILL
Clerk of the Supreme Court

Diane M. McHenry

By: Diane M. McHenry
Deputy

DM:dms

Enclosure

cc: William H. Daubney, Esq.